(7)

No. 90-918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHRISTINE FRANKLIN,
Petitioner,

v.

GWINNETT COUNTY SCHOOL DISTRICT
and WILLIAM PRESCOTT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF NATIONAL WOMEN'S LAW CENTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, AMERICANS FOR DEMOCRATIC ACTION, CENTER FOR WOMEN POLICY STUDIES, COALITION OF LABOR UNION WOMEN, DISPLACED HOMEMAKERS NETWORK,

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EQUAL RIGHTS ADVOCATES, INC., NATIONAL ASSOCIATION FOR GIRLS AND WOMEN IN SPORT, NATIONAL COUNCIL OF LA RAZA, NATIONAL EDUCATION ASSOCIATION, NATIONAL ORGANIZATION OF WOMEN, INC., NOW LEGAL DEFENSE AND EDUCATION FUND, OLDER WOMEN'S LEAGUE, WOMEN EMPLOYED, WOMEN'S LAW PROJECT, WOMEN'S LEGAL DEFENSE FUND, WOMEN'S SPORTS FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

Amici curiae are organizations sharing a strong commitment to the eradication of all forms of sex discrimination in education, including sexual harassment, and to the full enforcement of Title IX. They therefore desire to present their perspective on this extremely important case.[1]

Congress enacted Title IX to prohibit the pervasive and destructive practice of sex discrimination in education. According to Senator Bayh, the chief Senator sponsor, Title IX afforded "a strong and comprehensive measure [that] is needed to provide women with solid legal protection from persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women." 118 Cong. Rec. 5804 (1972).

Title IX constitutes broad-based remedial legislation specifically designed to eliminate sex discrimination throughout education. Its sponsors understood that Title IX "reache[d] into all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales." 118 Cong. Rec. 5803 (1972) (remarks of Sen. Bayh). It extended to financial aid, 118 Cong. Rec. 5805, and admission to prestigious honorary societies, 118 Cong. Rec. 5811. It prohibited vocational education programs that were sex-segregated, "teachers who favor their male students, and guidance counselors who discourage [females] from many careers that have limited numbers of women in higher levels of administration." 117 Cong. Rec. 25507 (1971) (remarks of Rep. Abzug).

Moreover, as lower courts have uniformly found, the sex discrimination prohibited by Title IX includes the

[1] Both petitioner and respondent have consented to the filing of this brief; copies of the parties' consent letters have been filed with the Clerk. Attached as an appendix to this brief are statements of the individual organizations who have joined as *amici curiae*.

form of sex discrimination at issue in this case, sexual harassment.[2] As this Court held in the employment context, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986).

Sexual harassment is a particularly pernicious form of sex discrimination that remains a serious problem in schools and on campuses today.[3] It denies girls and women the very opportunity to take advantage of educational services and opportunities, often driving them from education altogether. It violates the direct prohibitory language of Title IX that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681.

Amici believe that Congress' goal of eliminating all forms of sex discrimination in education, which forms the

[2] *See, e.g., Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Moire v. Temple University School of Medicine*, 613 F. Supp. 1360 (E.D. Pa. 1985), *aff'd mem.*, 800 F.2d 1136 (3d Cir. 1986).

[3] Numerous references in the legislative history accompanying the passage of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), make plain both the continuing nature of the problem and Congress' clear intent that sexual harassment constitutes a violation of Title IX. *See, e.g.*, S. Rep. No. 64, 100th Cong., 2d Sess. 12-13 (1987) (citing examples of sexual harassment cases dismissed under the doctrine of *Grove City College v. Bell*, 465 U.S. 555 (1984), to justify need for legislation); remarks of Senator Mitchell, 134 Cong. Rec. 388 (1988); remarks of Rep. Conyers, 134 Cong. Rec. 2939 (1988). While post-enactment history does not have "the weight of contemporary legislative history," the Court would be "remiss if [it] ignored these authoritative expressions concerning the scope and purpose of Title IX and its place within 'the civil rights enforcement scheme' . . . ." *Cannon v. University of Chicago*, 441 U.S. 677, 686-87 n.7 (1979).

express basis for Title IX, would be thwarted if the Court were to affirm the decision below. The intentional and egregious discrimination suffered by Christine Franklin at the hands of the school district, which knowingly tolerated repeated sexual assaults against her, will go unremedied in the absence of a compensatory damages remedy. Moreover, without a damages remedy, a valuable deterrent to intentional sex discrimination will be lost.

SUMMARY OF ARGUMENT

1. Petitioner Christine Franklin was the victim of intentional sex discrimination in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* (1988) ("Title IX"). The sole issue presented by this case is whether Ms. Franklin may obtain the damages remedy necessary to right the wrong she has suffered.

2. The existence of an implied right of action under Title IX is solidly grounded in the language, purposes, and legislative history of Title IX, as this Court held in *Cannon v. University of Chicago*, 441 U.S. 677 (1979). Continued adherence to *Cannon* is further justified by the implicit congressional ratification of *Cannon*'s holding in a 1986 enactment abrogating State sovereign immunity in actions under Title IX.

3. Title IX was enacted against the background of longstanding doctrines concerning the remedies available for violations of federal statutory rights. Compensatory damages are presumptively available for violations of rights under federal statutes unless there is a showing of congressional intent to the contrary. There is no indication in the legislative history of Title IX that Congress intended to abrogate the normal rule favoring the availability of a compensatory damage remedy. To the contrary, it is clear from the language and legislative history of Title IX that a compensatory damages remedy is

necessary to effectuate the purposes of Title IX. The propriety of a damages remedy is particularly clear where, as here, there is no other effective form of relief.

4. The decision in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), that conditions attached to federal spending must be unambiguous to impose an obligation upon a State, did not narrow the scope of remedies traditionally available once a violation of a condition has been established. Further, even if the contractual analysis employed by the Court in *Pennhurst* were applicable to the question of remedies, compensatory damages would be available under such an analysis. Petitioner, as a member of the protected class of Title IX, is an intended third-party beneficiary of the "contract" and would therefore be entitled to damages under contract principles. *Pennhurst* is also inapplicable where the case, as here, involves intentional discrimination.

5. When Congress acted in 1986 to abrogate state sovereign immunity in actions under Title IX, it legislatively ratified the availability of damages. The Eleventh Amendment immunity shields State treasuries only from damages awards, not from injunctive relief. Congress must have intended in 1986 for damages to be available, as it legislated to expand their availability.

6. The available evidence concerning filings and damages awards in discrimination cases shows that the availability of compensatory damages under Title IX cannot be expected to lead to frivolous or excessive awards.

I. *CANNON'S* HOLDING THAT A PRIVATE RIGHT OF ACTION EXISTS UNDER TITLE IX FORMS THE BASIS FOR A TITLE IX COMPENSATORY DAMAGES REMEDY

The Court's holding in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), that Title IX was intended to benefit individual victims of sex discrimination and therefore is enforceable by a private right of action, pro-

vides the predicate for Christine Franklin's entitlement to compensatory damages for the intentional discrimination she has suffered. The holding in *Cannon* is solidly grounded in the language, express purposes and legislative history of Title IX and is further confirmed by subsequent legislative and judicial developments.

As the Court emphasized in *Cannon*, the language of Title IX—"which expressly identifies the class Congress intended to benefit"—provides a compelling basis for inference of a private right of action. A private right of action is essential to effectuate the purposes of Title IX. "Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." *Cannon*, 441 U.S. at 703-04.

The determination in *Cannon* is strongly supported by the legislative history. "[F]ar from evidencing any purpose to *deny* a private cause of action, the history of Title IX rather plainly indicates that Congress intended to create such a remedy." *Cannon*, 441 U.S. at 694 (emphasis in original). Further, Title IX's language is nearly identical to that of Title VI, and Title IX was intended to "be interpreted and applied as Title VI had been during the preceding eight years." *Id.* at 696 (footnote omitted). That intention is significant because "the critical language in Title VI had already been construed as creating a private remedy." *Id.*

Moreover, as Justice Rehnquist emphasized in his concurring opinion in *Cannon*, the intent of Congress in enacting Title IX must be interpreted in light of the contemporaneous state of the law. Justice Rehnquist accordingly recognized that "Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act, tended to rely to a large extent on the courts to *decide* whether there should be a private right of

action, rather than determining this question for itself." *Id.* at 718 (Rehnquist, J., concurring) (emphasis in original). As the Court noted, the state of the law when Congress enacted Title IX strongly favored implied causes of action. "In fact, Congress enacted Title IX against a backdrop of three recently issued implied-cause-of-action decisions of this Court involving civil rights statutes with language similar to that in Title IX. In all three, a cause of action was found." *Id.* at 698 n.22 (citations omitted). "In the decade preceding the enactment of Title IX, the Court decided six implied-cause-of-action cases. In all of them a cause of action was found." *Id.* at 698 n.23 (citations omitted).

The Court reaffirmed this analysis in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378 (1982), stating that "[i]n determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on the issue, the initial focus must be on the state of the law at the time the legislation was enacted." As discussed below, the contemporaneous law, embodying longstanding principles that continue to govern to this day, also favored the broad availability of damages remedies.

Not only was *Cannon* correct when decided, there are additional reasons today for continuing to recognize a private right of action under Title IX. The existence of a private right of action was affirmatively ratified by Congress through the enactment of the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7 ("1986 Amendment"), in which Congress abrogated the Eleventh Amendment immunity of the States from suit under Title IX and various other anti-discrimination statutes.[4] While Congress did not intend to create any

[4] Section 2000d-7 reads as follows in pertinent part:

(a) General provision.

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in

new right of action in the 1986 Amendment, the inclusion of Title IX in the 1986 Amendment makes no sense unless it is construed as a congressional ratification of *Cannon*. This is not a situation, then, where the correctness of this Court's statutory interpretation is supported only by congressional acquiescence. Rather, Congress here has enacted legislation strongly indicating the correctness of this Court's decision.

The Court has applied the holding of *Cannon* to recognize private rights of action under parallel statutes in *Guardians Ass'n v. Civil Serv. Comm'n.*, 463 U.S. 582 (1983) (Title VI, upon which Title IX was patterned) and *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 (1984) (Rehabilitation Act).[5] This Court's subse-

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Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

[5] Moreover, this Court's post-*Cannon* decisions regarding the implication of a private right of action support continued adherence to *Cannon* under the doctrine of *stare decisis*. *Stare decisis* is at its strongest with respect to a case such as *Cannon* involving statutory interpretation. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989); *see also Payne v. Tennessee*, 111 S. Ct. 2597, 2610 (1991). Moreover, this is not a case where any "special justifications," *Patterson*, 491 U.S. at 172-74, justify deviation from the doctrine of *stare decisis*. *Cannon* has not proven to be unworkable or confusing. *Id.* Further, *Cannon* is "consistent with our society's deep commitment" to the eradication of sex discrimination. *Id.*

quent decisions concerning implied rights of action under other statutes have reaffirmed that congressional "intent may appear implicity in the language or structure of the statute, or in the circumstances of its enactment," the basis for the Court's holding in *Cannon*.[6] Indeed, in his concurring opinion in *Thompson*, Justice Scalia contrasted the situation there presented with the implication of the right of action in *Cannon*, which was based on "statutory language that, in the judicial interpretation of related legislation prior to [its] enactment, . . . had been held to create private rights of action." *Thompson*, 484 U.S. at 191 (Scalia, J., concurring) (citations omitted).[7]

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[6] Recent cases in which the Court has declined to confer a private right of action do not bring the vitality of *Cannon* into question. In *Thompson v. Thompson*, 484 U.S. 174 (1988), for example, the intent of Congress to rely upon the operation of the Full Faith and Credit Clause, rather than to create a private right of action, was evident from the language and context of the statute. *Id.* at 180-186. In *California v. Sierra Club*, 451 U.S. 287 (1981), the language of the statute did "not unmistakably focus on any particular class of beneficiaries whose welfare Congress intended to further," nor did the statute's legislative history or the context of its enactment reveal such a focus. *Id.* at 294-96. In *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), the Court refused to infer a private right of action where the statute expressly created a range of judicial and administrative enforcement mechanisms, *see id.* at 20, and there was no indication of congressional intent to permit a private right of action, in contrast to the intent underlying Title IX. *See* pp. 6-7 *supra*. In *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979), the Court refused to infer a private right of action where the statute "neither confers rights on private parties nor proscribes any conduct as unlawful," which is plainly not the case with Title IX.

[7] This case is based solely on a claim of intentional discrimination. Accordingly, it does not implicate the holding in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), unanimously reaffirmed by the Court in *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985), that while Title VI prohibits only intentional discrimination, its regulations properly reach disparate impact discrimination. Nor does it raise the issue of the applicability of that holding to Title IX. *Cf. Alexander v. Choate*, 469 U.S. at 294 n.11 (because of "fac-

It is against the clear intent of Congress to create a privately enforceable right in Title IX that the question of Ms. Franklin's claim to a compensatory damages remedy must be analyzed.[8]

II. COMPENSATORY DAMAGES, THE NORMAL REMEDY FOR A VIOLATION OF STATUTORY RIGHTS, ARE PERMISSIBLE UNDER TITLE IX

This case is governed by well-established principles that date back to the Framers' era and repeatedly have been embraced by this Court. Where a right of action exists under a federal statute, whether the right of action is express or implied, the presumption is that courts may provide relief using the full range of remedies, including damages. The presumption yields *only* where there is a clear indication of contrary legislative intent; the burden, then, is on those seeking to defeat the implication of a damages remedy. Here, the language, structure, context, and legislative history of Title IX demonstrate that Congress intended that the full range of remedies be available to those protected by its provisions.

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tors peculiar to Title VI," holding in *Guardians* that Title VI itself prohibits only intentional discrimination "would not seem to have any obvious or direct applicability to § 504."). This case does not present an occasion for the Court to address any of these issues.

[8] As this section demonstrates, there is no merit to the suggestion of the United States that this Court should reconsider its holding in *Cannon*. *See* Brief of the United States In Support of Petition for Certiorari (hereinafter "Br. of United States") at 9 n.6, 14 n.12. In this regard, it is noteworthy that the United States itself has previously taken the opposite position as to the existence of a private right of action under Title VI. *See Regents of Univ. of California v. Bakke*, 438 U.S. 265, 419 & n.26 (1978) (citing Supplemental Brief for the United States as *Amicus Curiae*). In any event, as the United States concedes, neither party has argued for the overruling of *Cannon*. Br. of United States at 14 n.12.

A. Violations Of Statutory Rights Are Normally Compensable By Damages Unless A Contrary Legislative Intent Can Be Shown

While federal courts are courts of limited jurisdiction, they have broad remedial authority in cases falling within their jurisdiction. As this Court has recognized repeatedly, "[t]he usual rule is that where legal rights have been invaded and a cause of action is available, a federal court may use any available remedy to afford full relief." *Guardians*, 463 U.S. at 595 (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946)). "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens v. Six Unknown Fed. Bureau Narcotics Agents*, 403 U.S. 388, 395 (1971). Compensatory damages is a "remedial mechanism normally available in the federal courts." *Id.* at 397. These principles, which have controlled since the early days of the federal judiciary, have their origins in English common law.

The common law rule favoring the availability of damages applies both in cases involving violations of constitutional rights and in cases involving violations of statutory rights. As the Court explained in *Texas and Pacific Ry. v. Rigsby*, 241 U.S. 33 (1916), where a violation of a statute

> results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Comyn's Dig. title, "Action upon Statute" (F), in these words: "So, in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."

Id. at 39 (citations omitted).

This Court has routinely implied the availability of compensatory damages both where the underlying right of

action was expressly created by statute, *see, e.g., Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and where the underlying right of action was itself implied, *see, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Board of Comm'rs of Jackson Cty., Kan. v. United States*, 308 U.S. 343 (1939); *Rigsby, supra.*

In *Sullivan*, the Court implied the availability of damages under 42 U.S.C. § 1982. The Court acknowledged that "§ 1982 is couched in declaratory terms and provides no explicit method of enforcement," but held that courts could provide both equitable and legal remedies under the statute. 396 U.S. at 238. Citing *Rigsby* and *Bell v. Hood*, the Court stated that "[t]he rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired." 396 U.S. at 238-40.

Merrill Lynch is a recent decision in which the Court inferred the existence of both a private right of action and a damages remedy under that right of action. The Court's determination as to the existence of the right of action was based on an extensive analysis of the context and legislative history of the statute. Once the Court found the right of action to exist, however, it held damages to be available without any separate discussion of remedies. *See Merrill Lynch*, 456 U.S. at 378-88.

In *Wyandotte*, the United States sought to recover from the owners of an abandoned vessel the cost of removing that vessel. The United States argued that criminal penalties against the responsible parties and an *in rem* action against the abandoned vessel, the remedies expressly provided by the Rivers and Harbors Act of 1899, were not the exclusive remedies available to the United States in recovering its expenditures. The Court held that the injunctions and criminal penalties provided by the Act were

"inadequate to ensure full effectiveness of the statute which Congress had intended." *Wyandotte*, 389 U.S. at 202. The Court therefore implied a cause of action *in personam* against the vessel owners and implied the availability of damages. *Id.* at 205.

Moreover, limiting a victim of sex discrimination to injunctive relief is directly contrary to the traditional preference in the federal courts for monetary relief. *See O'Shea v. Littleton*, 414 U.S. 488, 499 (1974) (citing *Younger v. Harris*, 401 U.S. 37, 43-44 (1971)); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959). There is consequently no merit to the position of the United States that injunctive relief should be the sole remedy unless the statute is "framed in terms suggesting that awards of damages are *essential* for effective enforcement." Br. of United States at 15 (emphasis added).[9]

The preference for legal relief has its origins in the English common law. As the Court noted in *Whitehead v. Shattuck*, 138 U.S. 146, 150-51 (1891):

> The sixteenth section of the Judiciary Act of 1789, . . . declared "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law" . . . . The provision is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedies, but only expressive of the law which has governed proceedings in equity ever since their adoption in the courts of England.[10]

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[9] Equitable remedies are, however, both authorized and appropriate in response to a violation of Title IX, as seven members of the Court found with respect to Title VI in *Guardians*. *See* 463 U.S. at 606-07 (White, J., joined by Rehnquist, J.); *id.* at 612 (O'Connor, J.); *id.* at 634 (Marshall, J.); *id.* at 636 (Stevens, J., joined by Brennan, J., and Blackmun, J.).

[10] *See also* C. McCormick, *A Handbook on the Law of Damages* 1 (1935).

The rule in federal courts, then, normally has been to permit legal remedies, and not to prefer equitable relief over legal relief in remedying statutory violations. Accordingly, where a federal statutory right has been violated, the implication of a damages remedy has long been the presumptive response.

B. Because There Is No Indication Of A Legislative Intent To Foreclose Compensatory Damages Under Title IX, Awards Of Compensatory Damages Are Permissible

This court has normally implied the availability of compensatory damages in the absence of a contrary legislative intent. *See* pp. 11-14, *supra*. Thus, the Court in *Wyandotte* indicated that it would deny the availability of damages only "[i]f there were no other reasonable interpretation of the statute, or if petitioners could adduce some persuasive indication that their interpretation accords with the congressional intent. . . ." *Wyandotte*, 389 U.S. at 200. "[I]n the absence of any contrary indication by Congress, courts may provide private litigants exercising implied rights of action whatever relief is consistent with the congressional purpose." *Transamerica Mortgage Advisors*, 444 U.S. at 30 (White, J., dissenting).

The same rule of construction governs here. In determining whether to imply the availability of damages, as in determining whether to imply a right of action, "the initial focus must be made on the state of the law at the time the legislation was enacted." *Merrill Lynch*, 456 U.S. at 378; *see also Thompson*, 484 U.S. at 179-80. Congress enacted Title IX against the background of the longstanding rule favoring the availability of compensatory damages. Not only is there no indication whatsoever in the legislative history that Congress intended to limit the normal range of remedies, the legislative history instead shows that Congress above all was concerned

about protecting the rights of victims of discrimination and envisioned a broad remedial scheme.[11] This is plain, for example, from the statements of Senator Bayh, the chief Senate sponsor of Title IX, who repeatedly described that legislation as a "strong and comprehensive measure" that would offer women "solid legal protection" from discrimination in education. *See, e.g.*, 118 Cong. Rec. 5804, 5807 (1972). Senator Bayh fully understood that Title IX's remedial scheme would reach broadly and expected that it would produce "a revolutionary impact on our American system of higher education." 117 Cong. Rec. 30155 (1971).[12]

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[11] One indicia of legislative intent to which the Court has looked in some cases is whether there are other remedies provided expressly by the statute. *See, e.g., Transamerica Mortgage Advisors*, 444 U.S. at 19-21. In *Transamerica*, the Court indicated that "where a statute expresly provides a particular remedy or remedies, a court must be chary of reading other remedies into it." *Id.* at 19. However, such a consideration simply cannot be applied to this case, as it would render meaningless the private right of action under Title IX, which the Court in *Cannon* found to exist. In fact, this Court in *Cannon* rejected the position that the administrative mechanism expressly provided for was the exclusive remedy under Title IX:

> The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute.

441 U.S. at 705-06.

[12] The legislative history of Title VI, upon which Title IX is modeled, provides further support. Addressing the non-exclusivity of the defunding remedy, Senator Ribicoff explained that "[i]n most cases alternative remedies, principally lawsuits to end discrimination, would be the preferable and more effective remedy." 110 Cong. Rec. 7067 (1964). *See also* remarks of Senator Humphrey, 110 Cong. Rec. 6545 (1964) (contemplating enforcement of Title VI through "litigation by private parties" with no reference to a limitation on remedies); remarks of Representative Lindsay, 110 Cong. Rec. 1540 (1964) ("Everything in this proposed legislation has to do with a body of law which will surround and protect the individual . . . .").

In enacting the Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (1988), Congress reaffirmed its intent that Title IX should be broadly construed to provide an effective remedy against the evils of sex-discrimination. As the Senate Report states:

> In enacting the four civil rights statutes [Title IX, Title VI, Section 504, and the Age Discrimination Act], Congress intended that each be broadly interpreted to provide effective remedies against discrimination. . . . It was understood at the outset that the task of eliminating discrimination from institutions which receive federal financial assistance could only be accomplished if the civil rights statutes were given the broadest interpretation.

S.Rep. No. 64, *supra*, at 5. *See also id.* at 7 ("The inescapable conclusion is that Congress intended that Title VI as well as its progeny—Title IV, Section 504, and the ADA—be given the broadest interpretation.")

In light of the absence of any indication that Congress intended to alter the traditional rules preferring compensatory damages and authorizing the judiciary to provide a damages remedy in cases of intentional discrimination, petitioner should be permitted to seek such damages.

C. The Availability Of Compensatory Damages Is Particularly Warranted Where, As Here, Equitable Relief Will Not Redress Plaintiff's Injury

The present case is clearly an instance where compensatory damages are the only effective means of remedying plaintiff's injuries. Neither an order enjoining further discriminatory activity nor a cut-off of funds to the institution would provide any remedy at all to Christine Franklin, who is no longer a student at North Gwinnett High School. "Injunctive or declaratory relief is useless to a person who has already been injured." *Butz v. Economou*, 438 U.S. 478, 504 (1978). For Christine

Franklin, "'it is damages or nothing.'" *Id.* at 504-05 (quoting *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 410 (1971)).

Moreover, this case offers a classic example of the limitations of the defunding remedy. Not only does it make "little sense to impose" on Ms. Franklin "the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cut-off of federal funding is appropriate," *Cannon*, 441 U.S. at 705, a fund termination order would provide no remedy at all for Ms. Franklin's injuries—even if she still were a student.

A damages remedy is also especially important in the area of education because claims often are time-consuming to adjudicate and the student may no longer be in school when a decision is finally rendered. The plaintiffs encountered this same dilemma in *Alexander v. Yale University*, 631 F.2d 178, 185 (2d Cir. 1980), where a claim of sexual harassment was dismissed because "[n]o money damages have been requested and . . . graduation has mooted [the plaintiffs'] claims for grievance procedures"). Thus, in the absence of a damages remedy, a sex discrimination claim might never be adjudicated at all, thus frustrating the central purpose of Title IX.

To eliminate compensatory damages from the range of remedies available under Title IX, then, would leave petitioner a statutory right without a remedy. Yet, *ubi jus, ibi remedium:* "'every right, when withheld, must have a remedy, and every injury its proper redress.'" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 Black Comm. 109)). "[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnote omitted). *Accord J. I. Case Co. v. Borak*, 377 U.S. 426, 433-35 (1964). Consequently, the implication of a damages rem-

edy is particularly justified where, as here, there is no other effective form of relief.

III. *PENNHURST* DOES NOT APPLY TO THE DETERMINATION OF THE AVAILABLE REMEDIES HERE

The court below erred in relying upon *Pennhurst* to deny a remedy of compensatory damages under Title IX. *Pennhurst* involved the determination of whether a State had accepted a substantive obligation pursuant to a funding statute. However, it has never been established that Title IX is solely a funding statute. *Amici* do not agree that it is, based on the strong Fourteenth Amendment implications in its purpose and history. Even assuming that Title IX is a spending clause enactment, *Pennhurst* addressed neither the nature of the remedies available for violations of the statute nor the traditional rule favoring damages for violations of federal statutes. Moreover, even if a *Pennhurst* contractual-type analysis were applicable to determining the available remedies under Title IX, such an analysis would confirm rather than defeat the availability of damages.

A. *Pennhurst* Did Not Reverse The Rule Favoring The Availability Of Compensatory Damages

In concluding that compensatory damages were unavailable under Title IX, the court below, citing Justice White's opinion in *Guardians*, 463 U.S. at 596-97, mistakenly relied upon *Pennhurst*. Based on the premise in *Pennhurst* that legislation providing grants to states pursuant to the Spending Clause of the Constitution is contractual in nature, the court below determined that the availability of remedies under Title IX must be construed narrowly. The decision in *Pennhurst*, however, pertains only to the existence of a substantive obligation under a Spending Clause statute, not to the range of remedies available upon a State's violation of an obligation which is undisputed.

In *Pennhurst*, a patient of a Pennsylvania hospital brought suit to challenge conditions at the hospital, claiming that the conditions violated, *inter alia*, rights granted by the Developmentally Disabled Assistance and Bill of Rights Act. Finding that the legislation was enacted pursuant to the Spending Clause and not the Fourteenth Amendment, the Court addressed the sole issue before it: whether § 6010, the "bill of rights" provision, was a condition that the State needed to satisfy to receive federal funding. The Court concluded that Congress did not intend § 6010 to be a condition, but meant it instead as an expression of congressional preferences. *See Pennhurst*, 451 U.S. at 18-20. The conclusion was based on the premise that the "legitimacy of Congress' power to legislate under the spending power rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.* at 17. Thus, the Court noted that conditions must be unambiguous for them to confer substantive "rights" upon private parties and to impose corresponding obligations upon the State. *See also South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

The Court's reasoning in *Pennhurst* has no bearing whatsoever on the issue of damages presented in this case. The Court simply did not speak to the issue of what remedies would be available to private litigants if the statute had imposed a substantive duty of care upon the State. *Pennhurst* applied the contract law analysis discussed above to determine whether the statute imposed specific obligations upon the receipt of federal funds. Such an analogy is wholly inapposite to the instant case:

> *Pennhurst* concerned what obligations were imposed upon recipients of funds, not what consequences flow from a violation of statutory conditions. In the present case, it is not disputed that Title IX is a condition of a receipt of federal funding. Thus, the analysis in *Pennhurst* is simply irrelevant.

Lieberman v. University of Chicago, 660 F.2d 1185, 1190 (7th Cir. 1981) (Swygert, J., dissenting), *cert. denied*,

456 U.S. 937 (1982). *See also Guardians Ass'n*, 463 U.S. at 636-37 (Stevens, J., dissenting) ("*Pennhurst* . . . concerned the existence or nonexistence of statutory rights, not remedies.").

The case principally relied upon by the *Pennhurst* Court, *Rosado v. Wyman*, 397 U.S. 397 (1970), is likewise inapplicable. Plaintiffs in *Rosado* challenged the compatibility of the New York Social Services Law with the Social Security Act, a funding statute, because New York was providing lesser payments to Aid to Families With Dependent Children (AFDC) recipients in Nassau County than to recipients in New York City. The Court granted the plaintiffs' request for an injunction against the payment of federal funds.

The *Rosado* Court never discussed the payment of damages. It did observe that "the State had alternative choices of assuming the additional cost *of paying benefits to families* . . . or not using federal funds to pay welfare benefits according to a plan that was inconsistent with federal requirements." *Id.* at 421 (emphasis added). The additional costs to which the Court referred in *Rosado*, however, were necessary to satisfy the terms of the contract; they were not damages to be paid for violating it.

Thus, neither *Pennhurst* nor *Rosado* cast doubt on the traditional rule of damages where Spending Clause enactments are involved.

B. Even Under The Contract-Type Analysis Of *Pennhurst*, Compensatory Damages To Third-Party Beneficiaries Are Permissible

Even if the contract-type analysis of *Pennhurst* were applicable to the issue of remedies here, it supports the availability of compensatory damages. Under contract law analysis, petitioner's situation would best be analogized to that of a third-party beneficiary under a con-

tract. Unquestionably, damages are an established remedy for such third-party beneficiaries.

Persons protected by Title IX satisfy the test for third-party beneficiaries. According to the *Restatement (Second) of Contracts* § 304 (1981), a "promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty." A beneficiary, in turn, is an intended beneficiary "if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." *Id.* at § 302.

Women, such as petitioner Christine Franklin, are intended beneficiaries of Title IX because they are among those intended to receive "the benefit of the promised performance" of Title IX. *Id.* Title IX states that "[n]o person in the United States shall, on the basis of sex, be . . . subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a). This statutory language shows "an unmistakable focus on the benefited class," and it "explicitly confers a benefit on persons discriminated against on the basis of sex. . . ." *Cannon*, 441 U.S. at 691, 694.[13]

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[13] The concerns raised by Justice White in *Guardians Association* in connection with the third-party beneficiary theory do not justify rejection of that theory. First, Justice White stated that Congress "may have felt that the salutary deterrent effect of a compensatory remedy was outweighed by the possibility that such a remedy would dissuade potential recipients from participating in important federal programs." 463 U.S. at 603 n.24. There is no indication in the legislative history, however, that Congress actually concluded that the risk of dissuading participation in federal programs outweighed the "salutary deterrent effect of a compensatory remedy." *Id.*

Second, Justice White cited the *Restatement* § 313 for the proposition that "a party who contracts with a government agency to

It is well settled that third-party beneficiaries may sue for damages. *See, e.g., United States v. Allstate Ins. Co.*, 910 F.2d 1281 (5th Cir. 1990); *Cunningham v. Healthco, Inc.*, 824 F.2d 1448, 1455-57 (5th Cir. 1987); *Dunn Appraisal Co. v. Honeywell Information Systems, Inc.*, 687 F.2d 877, 884-85 (6th Cir. 1982). *See also* E. Farnsworth, *Contracts* 734 (1982); *Corbin on Contracts* § 810, at 230 (1951); *Restatement, supra*, at § 307 comment a. Further, lower courts have found that damages may be awarded to third-party beneficiaries of contracts pursuant to spending power statutes. *See, e.g., Holbrook v. Pitt*, 643 F.2d 1261, 1276 (7th Cir. 1981) (holding that tenants in housing projects could recover retroactive benefits from HUD as third-party beneficiaries of Section 8 contracts). *See also Organization of Minority Vendors, Inc. v. Illinois Cent. Gulf R.R.*, 579 F. Supp. 574, 594 & n.10, 596-601 (N.D. Ill. 1983) (denying motion to dismiss third-party beneficiary claim of minority business enterprises under section 905(a) of the Railroad Revitalization and Regulatory Reform Act of 1976, which is modeled on Title VI, and also discussing the availability of damages).

C. Where the Statutory Violation Was Intentional, A Damages Remedy Is Consistent With Even The Most Expansive Application Of *Pennhurst*

Again assuming *arguendo* the applicability of a *Pennhurst*-based contract analysis to the question of Title IX remedies, Ms. Franklin is entitled to compensatory dam-

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do an act or render a service to the public is generally not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform." *Id.* This section of the *Restatement* also explains in Comment a that "individual members of the public are treated as incidental beneficiaries *unless a different intention is manifested.*" *Restatement (Second) of Contracts* § 313, Comment a (1981) (emphasis supplied). As discussed above, however, Congress clearly manifested the intention to make individual members of the public beneficiaries of Title IX.

ages precisely because there can be no suggestion that the nature of this obligation was ambiguous or that the recipient was "unaware of the condition[] or . . . unable to ascertain what is expected of it." 454 U.S. at 17. Surely respondent Gwinnett County Public Schools "was aware of the obligation" under Title IX to refrain from the intentional sexual harassment complained of by Christine Franklin. Since there can be no concern that the recipient will be subjected to an unfair or unanticipated liability through the imposition of a damages remedy, such a remedy is fully appropriate. Justice White explained in *Guardians*,

> [i]n cases where intentional discrimination has been shown, there can be no question as to what the recipient's obligation under the program was and no question that the recipient was aware of that obligation. In such situations, it may be that the victim of the intentional discrimination should be entitled to a compensatory award, as well as to prospective relief in the event the State continues with the program.

Guardians, 463 U.S. at 597 (opinion of White, J.).

Indeed, a majority of the Justices in *Guardians* distinguished the availability of damages in cases involving intentional discrimination, such as the instant case, from cases involving unintentional discrimination, as in *Guardians*. *See Guardians*, 463 U.S. 602-03, 606-07 (White, J., announcing the judgment of the Court, joined by Rehnquist, J.); *Id.* at 610-11 (Powell, J., concurring, joined by Burger, C.J. and Rehnquist, J.); *Id.* 615 (O'Connor, J., concurring). Relying on that distinction, the Third Circuit in *Pfeiffer v. Marion Center Area School Dist.*, 917 F.2d 779 (3d Cir. 1990), held that the plaintiff, a victim of intentional discrimination and violation of Title IX, was entitled to compensatory damages based on *Guardians*. *See id.* at 787-88. As the United States notes, the only appellate decisions other than the instant case to deny damages under Title IX for intentional discrimina-

tion were decided before *Guardians*. *See* Br. of United States at 12-13.

Thus, compensatory damages are especially appropriate in this case involving intentional discrimination.

IV. IN ENACTING THE CIVIL RIGHTS REMEDIES EQUALIZATION AMENDMENT OF 1986, CONGRESS RATIFIED THE AVAILABILITY OF COMPENSATORY DAMAGES

Congressional action following this Court's decision in *Cannon* confirms the existence of a cause of action for damages. As noted in Part I, *supra*, Congress affirmatively ratified the existence of a private right of action through the enactment of the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7 ("1986 Amendment"), which abrogated the Eleventh Amendment immunity of the States from suit under Title IX and certain other anti-discrimination statutes. The 1986 Amendment strongly supports not only the existence of a private right of action, but also the availability of compensatory damages.

The Eleventh Amendment immunity shields State treasuries only from damages awards, not from prospective injunctive relief. *See Edelman v. Jordan*, 415 U.S. 651, 663-71 (1974). When a state official is named, the Eleventh Amendment is no barrier to suits under Title IX for purely injunctive relief. The only change created by the 1986 Amendment was to eliminate the immunity of State treasuries from *damages* awards rendered pursuant to federal anti-discrimination statutes such as Title IX.

The 1986 Amendment therefore constitutes congressional ratification of the availability of compensatory damages under Title IX. The construction of Title IX advanced by petitioner is the only one that coheres with the 1986 Amendment. It would have been reasonable for Congress to have permitted compensatory damages under

Title IX without overriding State sovereign immunity, but it would have been pointless for Congress to have overridden State sovereign immunity for Title IX claims without permitting compensatory damages.

V. CONTRARY TO THE CONTENTION OF THE UNITED STATES, THE AVAILABILITY OF COMPENSATORY DAMAGES UNDER TITLE IX WOULD NOT LEAD TO FRIVOLOUS OR EXCESSIVE AWARDS

The United States has raised the specter of "a potentially massive financial liability," Br. of United States at 19, as a policy reason to reject a compensatory damages remedy under Title IX.[14] The United States offers no support for that proposition, however. The available evidence indicates, to the contrary, that damages awards in civil rights cases are limited in number and both appropriate and modest in amount.

Professors Theodore Eisenberg and Stewart Schwab prepared a thorough review of the research on precisely this question, considering a broad range of statutes providing damages remedies.[15] Following an examination of

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[14] The United States further argues against the creation of a damages remedy under Title IX on the grounds that it would be "anomalous" to create a broader remedy for sex discrimination in employment under Title IX than exists for race discrimination under either Title VI, 42 U.S.C. § 2000d, which has a more limited applicability to employment discrimination (although the nature of the limitation has not been clearly established), or Title VII, 42 U.S.C. §§ 2000e *et seq.*, which does not include a damages remedy. Br. of United States at 17-18. This argument disregards the availability of damages for claims of race discrimination in employment under other federal statutes, principally including 42 U.S.C. § 1981. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

[15] *See Hearings on H.R. 4000, Civil Rights Act of 1990, Joint Hearings Before the House Committee on Education and Labor*, 101st Cong., 2d Sess. vol. 2, at 142-71 (1990) (hereinafter "Hearings on H.R. 4000").

the propensity of discrimination victims to sue, they concluded that "[f]ar from revealing that potential discrimination claimants are eager to sue, the data show that discrimination victims are substantially less likely to file a legal action than are other disputants. The notion of the existence of a huge army of potential claimants waiting to exploit any marginal change in civil rights laws is not supported by any data." *Id.* at 152-53. Their conclusion is bolstered by a review of civil rights filings following the enactment of the Civil Rights Attorneys Fees Awards Act, 42 U.S.C. § 1988. The data show that civil rights filings covered by the Act increased at a substantially lower rate than other filings. *Hearings on H.R. 4000, supra,* at 153.

Second, Eisenberg and Schwab found that "[t]here is little evidence that victims are overcompensated by compensatory damages." *Id.* at 146. A recent study of damages awarded in all reported employment discrimination cases under 42 U.S.C. § 1981 from the period 1980 through 1990 likewise found that damages awarded by federal courts in discrimination cases are infrequent and modest. *See* Statement of Wendy S. White, Daniel W. Shelton & A. Mechele Dickerson entitled "Analysis of Damage Awards Under Section 1981," *Hearings On H.R. 1, The Civil Rights Act of 1991 Before the House Committee On Education And Labor*, 102d Cong., 1st Sess. 345 (1991). This study examined 121 reported cases in which an employer was held to have engaged in intentional racial discrimination. *Id.* at 349. Of those cases, only 69 cases resulted in an award of damages; the others resulted only in equitable remedies. *Id.* at 349-50. Furthermore, 42 of those awards—nearly two-thirds—were less than $50,000. *Id.* at 350.

Finally, a review of the federal reporters reveals very few Title IX cases at all in the twelve years since this Court decided *Cannon*. This is so despite the existence of the Civil Rights Attorneys Fees Awards Act of 1976,

permitting prevailing Title IX plaintiffs to recover their attorneys' fees. The "floodgates" argument is simply not based on fact and is not a legitimate basis for denying the normal range of remedies to victims of sex discrimination. *See Cannon*, 441 U.S. at 709-10.

CONCLUSION

The decision of the Court of Appeals should be reversed and the case remanded.

Respectfully submitted,

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APPENDIX

APPENDIX

STATEMENTS OF INDIVIDUAL AMICI CURIAE

The National Women's Law Center is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* It has a deep and abiding interest in assuring the availability of appropriate and effective remedies under Title IX, including monetary damages.

Founded in 1915, the American Association of University Professors (AAUP) is the nation's oldest and largest organization dedicated to advancing the interests of higher education from the perspective of faculty concerns. For many years and in many settings, AAUP has stressed that the full and fair enforcement of Title IX and other laws against discrimination is essential to combatting bias in American colleges and universities.

The American Association of University Women (AAUW) promotes equity for women, education and self-development over the life span, and positive societal change. AAUW includes 140,000 members nationwide and 1,700 local branches. Vigorous enforcement of Title IX is an AAUW priority.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan, membership organization dedicated to the principles of liberty and equality embodied in the Constitution and civil rights laws. The ACLU of Georgia is a state-wide affiliate of the ACLU.

The Americans for Democratic Action (ADA), a progressive, independent political organization, is a national coalition of civil rights and feminist leaders, academi-

cians, business people and trade unionists, grass roots activists, elected officials, church leaders, professionals, members of Congress and many others.

The Center for Women Policy Studies (CWPS) is a non-profit feminist organization founded in 1972. CWPS is dedicated to research and advocacy to further women's rights. One of CWPS' priorities is the achievement of educational equity. To that end CWPS supports a broad and effective interpretation of Title IX.

The Coalition of Labor Union Women (CLUW) is a national membership organization of women and men who are members of more than 65 international unions. CLUW has 45 active chapters and a National Executive Board composed of the female leadership of these international unions. A primary purpose of this national coalition is to remove all forms of discrimination from the workplace.

The Displaced Homemakers Network is comprised of over 1,000 local programs that provide education and training services to midlife and older women seeking to enter and re-enter the job market. The Network seeks to increase displaced homemakers' options for economic self-sufficiency.

Equal Rights Advocates, Inc., is a San Francisco-based public interest legal and educational corporation specializing in the area of sex discrimination. Since its inception over seventeen years ago, ERA has litigated cases and pursued public policies aimed at improving the condition of women and promoting the equality of the sexes under law.

The National Association for Girls and Women in Sport (NAGWS) is a non-profit organization for girls and women in sport. One of their basic interests is in achieving sex equity for athletes. We believe that discrimination cannot continue and, therefore, are in support of this *amicus* brief.

The National Council of La Raza (NCLR), the largest constituency-based national Hispanic organization, exists to improve life opportunities for the more than 22 million Americans of Hispanic descent. As a long time advocate of all Hispanics' rights to equal educational opportunities and to fair treatment in educational institutions, NCLR recognizes the importance of opposing any attempts to narrow the intended protections and remedies of Title XI. Title XI is of special importance to NCLR because Hispanic women may be vulnerable to multiple forms of prohibited discrimination—national origin and race, as well as gender. We must, therefore, be vigilant in our efforts to preserve the strength of all existing civil rights protections that benefit Hispanic women. NCLR would like to join the National Women's Law Center in its *amicus* brief to show its unqualified support for the position that a damages remedy is available under Title XI for an intentional violation of that statute.

The National Education Association (NEA) is a nationwide labor organization with more than two million members, the vast majority of whom are employed by public school districts, colleges and universities. One of the principal purposes of the NEA is to protect its members from gender discrimination by educational institutions.

The National Organization of Women, Inc. (NOW) is the largest feminist organization in the United States, and has as its goal to bring full equality to women. Essential to that goal is equal educational opportunity for all women and girls. From its inception NOW has worked on issues of equal education including Title IX and the Civil Rights Restoration Act restoring the full scope of Title IX. NOW has a strong interest in cases such as this one which seek to ensure remedies for victims of discrimination through rigorous enforcement of Title IX.

The NOW Legal Defense and Education Fund is one of the nation's foremost nonprofit advocacy organizations

dedicated to the elimination of sex discrimination. Since its inception in 1970, the NOW Legal Defense and Education Fund has been involved in many federal and state cases concerning the issues of sexual harassment, education and women's civil rights. NOW Legal Defense and Education Fund is especially concerned with the issues raised in this case because of the importance of ensuring that women and girls receive non-discriminatory education under non-discriminatory conditions.

The Older Women's League (OWL) was founded in 1980 to address the concerns of midlife and older women. It currently has over 20,000 members and donors and over 100 chapters in 36 states. Equitable access to education and education-related employment opportunities is essential to midlife and older women's economic security.

Women Employed is a national membership association of working women. Over the past sixteen years, the organization has assisted thousands of women with problems of discrimination, monitored the performance of equal opportunity enforcement agencies, analyzed equal opportunity policies, and developed specific, detailed proposals for improving enforcement efforts.

The Women's Law Project (WLP) is a nonprofit law firm dedicated to advancing the status and opportunities of women through litigation, public education and public policy advocacy. WLP has a strong interest in the availability of strong and effective remedies under Title IX of the Education Amendments of 1972, including compensatory damages.

The Women's Legal Defense Fund is a non-profit membership organization founded in 1971 to provide *pro bono* legal assistance to women who have been victims of race and sex discrimination. The Fund has devoted significant resources to combatting sex and race discrimination in federally-assisted programs and activities. The outcome of this case has far-reaching implications for women and minorities, as well as for handicapped persons, who have

been subjected to illegal discrimination by institutions receiving federal financial assistance and who are seeking to vindicate their legal rights.

The Women's Sports Foundation (Foundation), a nonprofit educational organization which fosters the participation of women in all forms of sport and which insists that there be equal opportunities for women in athletics, joins in the brief of Amicus Curiae. The Foundation believes that in order to ensure a right to equal opportunities in sport for women, as provided by Title IX of the Education Amendments of 1972, that an integral part of the right includes the opportunity to obtain money damages in appropriate cases.